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Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 627.

ARY E. ZONNE,

Appellant,

vs.

MINNEAPOLIS SYNDICATE, JOHN DELAITTRE, Treasurer and J. FRANK CONKLIN, Assistant Treasurer,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Brief for the Appellant.

STATEMENT.

The *Minneapolis Syndicate* is a corporation having a capital stock represented by shares, and was organized under the general laws of the State of Minnesota a number of years ago, with authority among other things, to buy, sell and improve real property.

On December 27th, 1906, the corporation was the owner of certain lots and parts of lots in Block 87, of the Town of Minneapolis, constituting the

westerly one-half of said block, together with a building thereon in which it had been engaged in letting stores and offices for rent. It owned no other property.

On the day last named, it sold and conveyed said building, and, at the same time, demised and let all of said parcels of land to certain lessees for and during the full term of 130 years from January 1st, 1907, to and including December 31st, 2036, at an annual rental of $61,000.00.

Since January 1st, 1907, the corporation has not owned any other property, and on said date it ceased to do business and, thereupon, caused its Articles of Incorporation (or charter) to be duly amended, pursuant to the statute of the State of Minnesota, so that thereafter the powers and purposes of said corporation were, and ever since have been, as defined by said amended Articles, as follows:

> "The sole purpose of the corporation shall be to hold the title to the westerly one-half of Block Eighty-seven (87) of the Town of Minneapolis, now vested in the corporation, subject to a lease thereon for a term of One Hundred and Thirty (130) years from January 1st, 1907; and, for the convenience of its stockholders, to receive, and to distribute among them, from time to time, the rentals that accrue under said lease, and the proceeds of any disposition of said land."

Since January 1st, 1907, the only income of said corporation has been the rental paid to it under said lease, and, since said date, said corporation has

observed the limitations of its amended Articles and has engaged in no business of any kind whatsoever.

The appellant is the owner of more than 800 shares of the capital stock of said corporation.

Prior to the first day of June, 1910, pursuant to the requirements of section 38 of the Act of Congress of August 5th, 1909, the officers of said corporation, in fear, and under compulsion, of the penalties declared by paragraph eighth of said section, made and delivered to the Collector of Internal Revenue of the District of Minnesota, a true and accurate return, under oath, in the form prescribed therefor, showing the gross and net incomes of said corporation for the year 1909, with the other matters and things demanded by the statute and by the regulations promulgated by the Commissioner of Internal Revenue. Said return was so made and delivered solely to avoid the imposition of the penalties prescribed by said Act of Congress, but was accompanied by the protest of said corporation against the requirement that such return be made, and against the filing of said return by said Collector, and against the listing of said corporation as liable to payment of the special excise tax imposed by said Act, upon the grounds that said Act was without the jurisdiction and beyond the powers of Congress to enact, that it is unjust and unequal in its operation, that it is contrary to the constitution and laws of the United States, and *that said corporation is not subject to the tax imposed thereby.*

Thereafter, the Commissioner of Internal Revenue assumed to assess against said corporation a tax of $555.00 under the provisions of said Act of August, 1909.

At a regular meeting of the Board of Directors of said corporation, held May 31st, 1910, a motion was introduced to the effect that the directors refuse to pay said tax, and that proper steps be taken to be relieved from said assessment, upon the grounds that the Act is unconstitutional and void, and that said corporation is not, in any event, subject to the tax attempted to be assessed and collected thereunder; but said corporation, acting through its Board of Directors, voted down said motion, and thereupon adopted a resolution authorizing and instructing its treasurer to pay said tax on or before the 30th day of June, 1910. Whereupon, the appellant brought this action in the United States Circuit Court for the District of Minnesota, asking that the defendants, and each of them, be perpetually restrained from paying said tax, and, pending the final determination of this cause, that a temporary writ of injunction be issued restraining each of said defendants from making such payment.

To the bill so filed by the appellant, the defendants appeared and filed a general demurrer, which was sustained by the Circuit Court, and, the plaintiff having declined to amend its complaint or to replead, a final decree was ordered to be entered dismissing the bill of complaint on the merits. Such final decree having been made and entered in the

cause, the appellant has brought the case to this Court upon appeal.

The cause is one of which the Court has jurisdiction under subdivision 4 of section 629, of the Revised Statutes, inasmuch as it is one arising under a law providing internal revenue.

ASSIGNMENTS OF ERROR.

The decree in the above entitled cause is erroneous and against the just rights of the appellant, and the demurrer of the defendants to the bill of complaint should have been overruled, for the reasons:

1st. That section 38 of the Act of Congress of August 5th, 1909, is unconstitutional and void for the reasons set forth in the bill of complaint;

2nd. That if said section be constitutional and valid, the defendant corporation is not subject to the tax imposed thereby.

It will be seen that this case presents two questions:

I. *Is the corporation-tax law constitutional and valid?*

II. *If it be constitutional and valid, is it operative upon the Minneapolis Syndicate?*

As to the validity of the Act, the appellant contends that it is unconstitutional and void for the reasons:

1st. That the tax attempted to be imposed is not an excise but a direct tax.

2nd. That it is not uniform in its operation.

3rd. That it invades the sovereignty of the States.

As to the second question, the appellant contends:

1st. That, under its amended Articles of Incorporation, the *Minneapolis Syndicate* is not a corporation "organized for profit," and therefore, not taxable under the terms of the statute.

2nd. That since January 1st, 1907, it has not been "carrying on or doing business," so as to fall within the category of taxable corporations.

We have not had opportunity to inspect the briefs filed on the former argument of the corporation tax cases, with the exception of the brief for the *United States*, in support of the law, and the briefs for the appellants in the *Flint* and *Mitchell* cases. We may be assured, however, that all phases of this law have been carefully presented, and shall therefore, as respects the consideration of the constitutionality of the act, content ourselves with the brief discussion which follows.

POINT I.

IS THE CORPORATION TAX LAW CONSTITUTIONAL AND VALID?

If the tax be *a direct tax* it must be laid in proportion to the population (Const. Art. I, §9). There is no contention advanced that this tax, if direct, would be valid, for no pretence of an apportionment among the states is made.

If the tax be *an excise* it must be uniform throughout the United States (Const. Art. I, §9).

1. The tax is not an excise, but a direct tax.

In order to be able to consider the true nature of the tax, it is essential, first, to determine

The subject of the tax.

While the language of the act is simple and provides "that every corporation, joint stock company "or association, organized for profit and having "a capital stock represented by shares * * * "shall be subject to pay annually a special excise "tax with respect to the carrying on or doing busi-"ness by such corporation, joint stock company or "association," it cannot be conceded that the tax is in fact "a special excise tax"; neither can it be conceded that a tax "with respect to the carrying on or doing business" is not a tax upon property and a direct tax.

In the brief filed for the United States in March, 1910, upon the argument of the *Corporation Tax Cases* early in this year, it was asserted, (*a*) that

the subject of the tax is expressly declared to be "the carrying on or doing business" by the companies taxed; that the property of the company is not the subject of the tax and that the franchises of the company are not the subject of the tax; that, so far as property or franchises are involved at all, it is only their *use in business* that forms the subject of the tax (p. 9). And, at page 35, it is said: "A tax upon *the use of franchises* in business is no "more a direct tax upon the franchises, than a tax "upon the use of property in business is a direct "tax upon the property so used."

In another place it was stated (*b*) that the tax may be said to be one "upon the enjoyment or utilization in business of the peculiar advantages accorded by the law to corporate business" (p. 26).

Still later, it is set down flat-footedly (*c*) as *a privilege-tax* rather than a property tax (p. 40).

It may be taken, then, as the position of the Government, that the tax is a tax upon the privilege of *doing business under a corporate franchise;* or, differently stated, a tax upon the enjoyment of the special advantages which attach to a business tranacted under the exceptional legal rules applying to corporations and joint stock companies as distinguished from individuals and partnerships.

Let us discuss it in this light.

Before proceeding further, it will clarify the situation if we ascertain

The true nature of a franchise.

Franchise is defined by Webster as "A particular "privilege conferred by grant from a sovereign or "a government, and *vested in individuals.*"

> "The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs *to the incorporators,* while the powers and privileges vested in and to be exercised by the corporate body as such are the franchises *of the corporation.* The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."
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> *Memphis R. R. Co. v. Commissioners,* 112 U. S., 609, 619.

In *Home Insurance Company v. New York,* 134 U. S., 594, MR. JUSTICE FIELD said:

> "By the term 'corporate franchise or business' as here used [referring to a law of the state of New York imposing a tax on the corporate franchise or business of a corporation], we understand is meant * * * the right or privilege given by the state *to two or more persons* of being a corporation; that is, *of doing business in a corporate capacity,* and not the privilege or franchise which, when incorporated, the company may exercise" (p. 599).

In *Ashley v. Ryan,* 153 U. S., 436, MR. JUSTICE WHITE, in delivering the opinion of this court, quoted approvingly from the decision in *Home Ins. Co. v. New York,* as follows (p. 442):

> "The right or privilege to be a corporation, or *to do business* as such body, is one general-

> ly deemed of value to the corporation or it would not be sought in such numbers as at present. It is a right or privilege by which *several individuals* may unite themselves under a common name, and *act* as a single person with a succession of members, without dissolution or suspension of business, and with a limited individual liability."

He added:

> "These citations only reiterate principles established beyond controversy by a series of decisions. *Bank of Augusta v. Earle,* 38 U. S., 519; *Lafayette Ins. Co. v. French,* 59 U. S., 404; *Paul v. Virginia,* 75 U. S., 168; *Ducat v. Chicago,* 77 U. S., 410."

And he quoted further from the opinion of MR. JUSTICE FIELD in *Paul v. Virginia,* at page 181, as follows:

> "Now a grant of a corporate existence is a grant of special privileges *to the incorporators,* enabling *them* to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability."

In *Horn Silver Mining Co. v. State of New York,* 143 U. S., 305, MR. JUSTICE FIELD, speaking of the nature of a corporation, said (page 312):

> "Its creation is the investing of *two or more persons* with the capacity to act as a single individual, with a common name, and the privilege of succession without dissolution, and with a limited individual liability. The right and privilege, or the franchise as it may be termed, of being a corporation is of great value to *its members.*"

It is important to observe the distinction, thus clearly made, between the grant *to the incorpora-*

tors of being and *acting* as a corporation and the privilege or franchise vested in the corporation, in that the power *to do business as a corporation* is the right and privilege—or franchise—of the incorporators.

Simply stated, a charter of incorporation is merely governmental permission to individual incorporators to act together, under a single name, for certain defined purposes, with the advantages *to them* of perpetual succession and of a limited liability.

The real privileges, and "the peculiar advantages accorded by the law to corporate business," consist in the powers thus granted to the incorporators. The corporation itself enjoys no peculiar powers, or any that are different from those possessed by individuals acting singly or in partnership; but, in fact, by reason of its charter limitations, its powers are less than those which may be exercised by individuals.

Lyon-Thomas Co. v. Perry Stove Co., 86 Texas, 143.

The stockholders of a corporation are the ones to whose discretion is committed the determination of what action shall be taken in their corporate capacity. If after they become incorporated they see fit to do nothing, *the corporation* is powerless until they shall decide to act.

The right of being a corporation and "of doing business in a corporate capacity" is the right which is expressly granted *to the incorporators*, and, if

taxable at all, must be taxed as against them. They are the ones who own and *use* the franchise to do business as a corporation, and, if a tax be levied upon such use, it must be levied against the stockholders as such, and not against the corporation.

The privilege or right vested in the incorporators is property.

This court declared, in *Veazie Bank v. Fenno*, 75 U. S., 533, 547:

> "Franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a state, seem to be as proper objects of taxation as any other property."

And again, in *Horn Silver Mining Co. v. State of New York*, 143 U. S., 305, 313:

> "The right and privilege, *or the franchise, as it may be termed*, of being a corporation, is of great value to *its members*, and is considered as *property* separate and distinct from the property which the corporation itself may acquire. According to the law of most states, this franchise or privilege of being a corporation is deemed personal property and is subject to separate taxation."

In *Central Pacific Ry. Co. v. California*, 162 U. S., 91, MR. CHIEF JUSTICE FULLER, referring to "the right and privilege of corporate capacity," said (p. 126):

> "It is not to be denied that such rights and privileges have value and constitute taxable property. The general rule, as stated by Mr. Justice Miller in *Taylor v. Secor*, 92 U. S., 575, 603, that 'the franchise, capital stock, busi-

> ness and profits of all corporations are liable to taxation in the place where they do business and by the state which creates them, admits of no dispute at this date.' "

It thus appears that the gift by a state to individuals of the right to be, and to do business as, a corporation is a franchise which belongs to *them*, and is distinct from the privileges and "special advantages" exercised by the corporation as such; but each is a franchise, and, as such, is property, and a tax imposed thereon is a tax upon property, and, as will be later urged, a direct tax and not an excise.

In the *Pollock Case* (pp. 625-6), CHIEF JUSTICE FULLER asks:

> "What in fact is property but a fiction, without *the beneficial use* of it? In many cases indeed the *income or annuity* is the property itself."

Again, at page 628:

> "We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions *between that which gives value to property and the property itself.*"

It is palpable that the distinction sought to be made in support of the act of August 5, 1909, between the possession of corporate powers (whatever they may be), and *the exercise of those powers*, as separate objects of taxation, is too subtle and diaphanous to be recognized by the courts; for, if the gift of specified corporate powers be a franchise,

the gift is without vitality and valueless unless there be included in it the right of enjoyment of those powers. It is a separation, in a gift of life, of soul and body; the two are inseparable, and the existence of life compels the conjunction of the two. Hence, to say that the tax is upon the use of the franchise, but not upon the franchise, is a false premise. "You take my life when you do take the means whereby I live"; and it is inconceivable that the ownership or possession of a franchise is distinct from the right of enjoyment of that franchise.

The appellant, therefore, contends:

1. That a tax upon the use of the franchise is a tax upon the franchise itself.

2. That such tax must be imposed upon the incorporators (the owners of the franchise and of the right to use it), or upon their successors, the stockholders, and not upon the corporation.

If the Act of August 5th can be sustained, it must be because the tax which it attempts to create is an *indirect tax*. And if it be an indirect tax, it is necessarily an excise tax.

What is an Excise Tax?

No more concise, comprehensive and satisfactory definition of an excise has come to our attention than that of MR. JUSTICE FIELD in his opinion in the *Pollock Case* upon its first hearing, as follows (157 U. S., 592):

> "Excises are a species of tax consisting, generally, of duties laid upon the manufacture, sale or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them."

This form of tax being indirect is not one which may be imposed on *the business;* so that, if it is to be sustained as an excise, the corporation tax must, under this definition—and under the conception of those seeking to sustain it—be construed to be one upon *the engaging in business as a corporation,* as distinguished from doing business as an individual or partnership.

This court has held that, although it may be competent to impose a tax upon the facilities made use of and actually employed in the transaction of business, separate and apart from the business itself (*Nicol v. Ames,* 173 U. S., 509), *as respects peculiar facilities which are afforded by boards of trade or exchanges,* yet a tax upon similar business *conducted elsewhere* would be radically different, and would be "really and practically upon property" (*idem,* 521).

The recognition of this difference is vital in this connection, because it illustrates that, in order to be valid, the present tax must be construed to be an excise tax upon the mere franchise of *being a corporation,* and that franchise, as we have seen, belongs not to the corporation but to the individual incorporators, or to their successors, the stockholders of the corporation.

A further demonstration of the truth of the contention that this tax is not upon *the privilege of doing business in corporate form*, or upon *the use of corporate franchises*, or of carrying on business "under the special conditions which surround, and with the special advantages which attach to, such business when it is transacted under the exceptional legal rules applying to corporations and joint stock companies," is, that joint stock companies do not possess and exercise *corporate franchises*, and that insurance business can be and is conducted by unincorporated companies, as is frankly conceded in the brief for the United States of March, 1910, at pages 35-6.

This court, in the *Pollock Case*, has settled for all time that an income tax, unapportioned, cannot be imposed by Congress; *and Congress has recognized the validity and conclusiveness of that decision by the adoption, at its last session, of a joint resolution for submission to the various states, amending the Constitution of the United States as follows*:

> "Article XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." (44 *Congressional Record*, pp. 4390-4440).

If organizations or associations which do not enjoy corporate privileges can be assessed merely because they are doing business and receive a net income in excess of $5,000, and can be compelled to

pay a tax, not for the corporate privilege of doing business, but solely because they receive such net income, and solely with reference to the amount of such net income, then astute legislators can overrule the determination of this court, and can render nugatory and unessential the action of Congress in adopting this income-tax amendment to the federal constitution. By similar subterfuge, every income in the United States can be subjected to a tax at the election of the national legislature.

It is submitted that, as against a corporation, the tax can, at the best, only be one upon the business and is invalid, because a direct tax and unapportioned. It does not purport to be imposed "upon the manufacture, sale or consumption of commodities within the country," nor to be laid "upon certain callings or occupations" enjoying special facilities or advantages; but is laid upon every corporation for profit carrying on or doing business, and, under the rule in Nicol v. Ames, is a direct tax upon property.

What is a Direct Tax?

A direct tax may be said to be one laid upon property as a possession or asset of value, as distinguished from an act or calling in relation to it such, for example, as its manufacture, sale or consumption.

JUDGE COOLEY gives this:

> "Taxes are said to be direct, under which designation may be included those which are

> assessed upon the property, person, business, income, etc., of those who are to pay them."
>
> *Taxation* (2d Ed.), 6.

In *Knowlton v. Moore,* 178 U. S., at page 47, MR. JUSTICE WHITE employed the following description:

> "Direct taxes bear immediately upon persons, upon the possession and enjoyment of rights; indirect taxes are levied upon the happening of an event, or an exchange."

CHIEF JUSTICE FULLER, in the *Pollock Case* (158 U. S. 618), after referring to the previous decision in that case, and the narrow limits to which it was confined, said:

> "We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner described, is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution."

If a tax upon rents derived from real property, which is the income or usufruct thereof, be a direct tax upon the property itself, and if a tax upon the income of personal property, which is the return for the use of that property, be a direct tax upon the source of that income, *how can it be said that a tax upon the use of a franchise,* without which use the franchise is dormant, valueless and incap-

able of enjoyment, *is not a direct tax upon the franchise?* To hold otherwise, would the court not be guilty of varying the form without varying the substance, as CHIEF JUSTICE MARSHALL said in *Brown v. Maryland,* 25 U. S., 444? And is it different from the tax upon the sale of imported merchandise, which was considered and held in that case to be invalid as being a tax on the merchandise itself? Or is it different from the tax on a bill of lading, which was declared in *Almy v. California,* 65 U. S., 169, to be the same thing as a tax on the merchandise transported? Is it not in the same category as the tax upon stock issued for loans, which was adjudged in *Weston v. Charleston,* 27 U. S., 449, to be invalid as a tax upon the loans themselves?

It was recognized by this court in *Central Pacific R. R. Co. v. State of California,* 162 U. S., 91, 125, that where the franchise of a corporation is not taxable, "*its corporate capacity and its power to transact business and charge therefor, could not be.*" And MR. JUSTICE FIELD, in his opinion in the same case (dissenting on other points, but not on this), referred to the decision in *California v. Central Pacific R. R. Co.,* 127 U. S., 1, and said, that, in that case, "it was determined that the fran-"chise of that company *and its use* were equally be-"yond the taxing power of the state."

In *Union Pacific R. R. Co. v. Peniston,* 85 U. S. 5, MR. JUSTICE STRONG said, with reference to the decision in *McCulloch v. Maryland* (page 35):

> "The tax held unconstitutional was laid upon the notes of the bank. The institution was prohibited from issuing notes at all except upon stamped paper furnished by the state and to be paid for on delivery, the stamp on each note being apportioned to its denomination. The tax, therefore, was not upon any property of the bank, but upon *one of its operations;* in fact, *upon its right to exist as created.*"

The franchise of a corporation is its charter of existence, and, if a tax upon the exercise of one of its several granted powers is a tax upon its right to exist, a tax upon its use of all its charter rights is, *a fortiori,* such a tax—that is, a tax upon the franchise. The attempted distinction between the franchise and the use of the franchise is unsubstantial and must be condemned.

Respecting the tax involved in the *Union Pacific Case,* MR. JUSTICE STRONG emphasized this very contention—and defined anew the meaning of "franchise,"—saying (page 37):

> "In this case the tax is laid upon the property of the Railroad Company * * *, it is not imposed upon the franchises, *or right of the company to exist and perform the functions for which it was brought into being; nor is it laid upon any act which the company has been authorized to do.*"

In *San Benito County v. Southern Pacific Ry. Co.,* 77 Cal., 518, the Supreme Court of California, following the decision of this court in the *Central Pacific Case,* 127 U. S., 1, said (page 523):

> "It seems to us that the reasoning of the court in the above cases applies with as much

force to the license tax *upon the use of the franchise*—the operations of the road and the conduct of its business—as to the tax upon the franchise as property."

It being granted that a corporation which does not use its franchise is exempt from the payment of a tax under the express language of the Act of August 5, 1909 (Attorney General's brief of March, 1910, pp. 29, 36, 39), it follows that, in the interpretation of the law most favorable to the Government position, the tax is, in effect, one upon *the use of the franchise.*

Since franchises are property and taxable as such (Veazie Bank v. Fenno, 8 Wall., 533; Central Pacific Railway Co. v. California, 162 U. S., 91, 126; Horn Silver Mining Co. v. New York, 143 U. S., 305, 313); since it must be admitted that a franchise has no value save that which arises from the use and enjoyment of it; and since it is impossible to force a distinction "between that which gives value to the property and the property itself" (Pollock Case, pp. 625-6, 628), the conclusion is inevitable that a tax upon the use of a franchise is a tax upon the franchise itself, and, unapportioned, is invalid.

The tax is one upon incomes.

As a tax upon the use of the franchise cannot be exacted under the terms of the law unless there result from such use a net income of more than $5,000, the condition which determines the taxability of the use of the franchise is the receipt by

a corporation, from its business, of a net income in excess of $5,000.

The right to carry on business is a natural right, and one not derived from or dependent on, the franchise to act as a corporation, although, as we have seen, this natural right is strictly limited, in the case of a corporation, by its charter. The business done, however, is profitable or unprofitable by reason, in part, of the prevailing conditions of commerce and trade, though chiefly by reason of the industry and capacity of the individuals in charge of its operation, *but wholly irrespective of the franchise, not because of it.* There is no relation between them of cause and effect. The tax under discussion, then, instead of being a tax for the privilege of doing business in a corporate capacity, amounts to a tax upon—or, at least, proportioned to—the business ability of the individual corporation-managers, and is thus seen to be, in the last analysis and essentially, a tax upon the product of that ability,—the net income of the business.

If it were a tax upon the privilege, or upon the use or enjoyment of the privilege of carrying on or doing business as a corporation, it would necessarily lie, and be collectible, in every case where the privilege is extended, or used or enjoyed; otherwise, the law is not uniform in its operation.

When it is considered that, in the instances of, say, four corporations, organized under the same law, with the same capitalization, and with the same powers and purposes, if the business of the first corporation be unprofitable to the degree that

a loss results from its pursuit, no tax can be imposed for "the carrying on or doing business by such corporation"; that, if, from the conduct of the business of the second corporation, there result a net income not exceeding $5,000, no tax can be imposed or collected from such corporation; that, in the case of the third, if there accrue, from the carrying on or doing business by such corporation, a net income of $10,000, a tax of $50 is imposed and must be paid, while, in the fourth case, if a net income of $155,000 be obtained from the carrying on or doing business by such corporation, a tax of $1,500 must be paid—then it is evident that the tax is not one upon the corporate privilege of doing business "under the special conditions which surround, and with the special advantages which attach to, such business when it is transacted under the exceptional legal rules applying to corporations and joint stock companies," but is a tax imposed only upon a corporation or joint stock company *which receives net income in excess of* $5,000, and only *because* it has gained such net income during the tax year.

When the liability of a corporation to pay a tax is made wholly dependent upon its earning a net income, and when the amount of the tax to be paid is wholly dependent upon the amount of such net income, it is impossible to escape the conclusion that, whatever it may be called, or under whatever law it may be imposed, the tax is an income tax pure and simple.

The language of JUSTICE PECKHAM, in *Nicol v. Ames*, 173 U. S., 515, is very apt:

> "The commands of the constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But, while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede or obstruct the exercise of the taxing power by merely abstruse and subtle definitions as to the particular nature of a specified tax, where such distinction rests more upon the different theories of political economists than upon *the practical nature of the tax itself.*"

A case cannot be presented where it has been necessary to resort to finer spun theories, and more palpably abstruse and subtle distinctions, as to the nature of a tax, than are indulged by those seeking to sustain the act of August 5, 1909, as one imposing a legitimate and constitutional excise tax. On the other hand, "the practical nature of the tax itself" is patent.

In *Henderson v. The Mayor*, 92 U. S., 259, where the owners of vessels from foreign ports were required to pay a fixed sum for every passenger whom they landed, or to give a bond that every such passenger should not become a burden on the state, it was held that, in effect, the tax was one on the passenger, however it might be disguised by the language of the act, and this court said (page 268):

> "In whatever language a statute may be framed, *its purpose must be determined by its natural and reasonable effect;* and if it is apparent that the object of this statute, as judged

> *by that criterion*, is to compel the owner of vessels to pay a sum of money for every passenger brought by them from foreign shores and landed at the port of New York, it is as much a tax on passengers, if collected from them, or a tax on the vessel or owner for the right of landing their passengers in that city, as was the statute held void in *Passenger Cases.*"

If a tax upon owners of vessels from foreign ports for every passenger landed by them be a tax upon the passenger, because the natural and reasonable effect of the statute is ultimately to increase the cost of carriage to each passenger by the amount of the tax imposed, so "the natural and reasonable effect" of exacting the tax upon a corporation only in case it receive a net income in excess of $5,000, and of measuring the tax by the amount of such net income, irrespective of the nature of the corporate privilege which it uses, or of its capitalization, or of its assets, or of the aggregate amount of its business,—as well as of the capitalization, assets and aggregate amount of business of its competitors, and of other corporations similarly organized and empowered,—determines the real purpose of the Act of August 5, 1909, to be a tax upon the net income of such corporation in excess of $5,000.

A pertinent inquiry is: *If it were competent for the Congress to impose an income tax upon corporations, joint stock companies and insurance companies, how could it enact such tax law in clearer or directer terms?* All of the requisites of such a law are present in the Act of August 5th; and no

provision of the Act of August 5th is inappropriate to an income tax law.

Under the law as it stands, no corporation, joint stock company, or insurance company is amenable to taxation unless it receive a net income in excess of $5,000 per year; it therefore becomes liable to taxation *because* it receives a net income in excess of $5,000.

Both the amount of, and the liability to pay, the tax are fixed, not by the fact that a corporation is enjoying the privilege of doing business in a corporate capacity, not by the amount of its authorized or actual capital stock, not by the nature or extent of the powers which have been conferred upon it by its charter, not by the value of its assets or by the volume of its business, but simply (and, if this be an excise tax, unrelatedly) by the amount of its net income.

It is submitted that, if this be not an income tax law, it is in the power of Congress—despite the declaration of this court (in the *Pollock Case*) and of Congress (in the adoption of the proposed XVI Amendment) that Congress now possesses no authority to levy an income tax—to impose, in the insidious manner attempted by the act of August 5th, a tax upon every income in the United States, corporate or individual; for it must be conceded that it is a mere matter of classification which has caused corporations, joint stock companies and insurance companies only to be included in the provisions of this law.

In the case of the *State Freight Tax Case*, 15 Wall., 232, MR. JUSTICE STRONG, delivering the opinion of this court, said (page 272):

> "Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of *Bank of Commerce v. New York City*, 2 Black, 620; in *The Bank Tax Case*, 2 Wall., 200; *Society for Savings v. Coite*, 6 Wall., 594, and *Provident Bank v. Massachusetts*, 6 Wall., 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decision turned upon the questions: What was the subject of the tax, upon what did the burden really rest, not upon the question, from whom the State exacted payment into its treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank it was sustained.
>
> "Upon what, then, is the tax imposed by the Act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. The companies are required to pay to the state treasurer for the use of the Commonwealth, 'on each two thousand pounds of freight so carried,' a tax at the

specified rates. *And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred.* If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight."

The analogy between the law there construed and the one under consideration is obvious and controlling.

In that case, the tax purported to be one laid on transportation companies for carrying on and doing business in transportation of freight. In this case, the tax purports to be one laid upon all corporations "with respect to carrying on or doing business." In that case, the amount of the tax was measured by the tons of freight carried by the respective corporations, and not by the capitalization of the company or by the gross amount of its business, or even by its freight receipts. In this case, the tax is laid upon corporations without reference to the amount of business done, or the assets employed in business, or the capitalization of the respective corporations, or even to the nature and extent of the franchise used or enjoyed by them, but the amount of the tax is fixed, arbitrarily and without relation to its pretended character as an excise tax, by the amount of the net income in excess of $5,000.

In the *State Freight Tax Case*, it was held that the tax was not one upon corporations doing a transportation business, nor upon other franchises or other business, but that the subject of the tax

was *in fact* the freight transported, the court saying:

> "In view of these provisions of the statute, it is impossible to escape from the conviction that the burden of the tax rests *upon the freight transported*, or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the state treasury is in effect only a tax gatherer."

The mode of arriving at the amount of the tax determined the character of the impost, just as in the Henderson Case.

If, then, the tax in that case was a tax, not upon the corporations but upon the freight, so here, by the same criterion, it must be held that the tax objected to is not upon carrying on or doing business as a corporation, but upon net incomes above $5,000.

Still further, since, in the case cited, the tax was held to rest upon the freight transported, "or upon the consignor or consignee of the freight," so, under the act of August 5, 1909, it must be said that the tax on net incomes in excess of $5,000 is, in effect, a tax upon the stockholders of each corporation receiving such net income, and is manifestly a direct tax and one which the Congress has no power to lay except by apportionment, under the rule of the *Pollock case.*

In *Cook v. Pennsylvania*, 97 U. S., 566, in construing a statute of the state of Pennsylvania requiring auctioneers to pay a license tax, this court

overruled the contentions of the state that the authority of the auctioneer to make any sales is derived from the state, and that the state can therefore impose upon *him* a tax for the privilege conferred; that the mode adopted by the statute of measuring that tax by the amount of his sales was within the power of the state; that, being a tax on the auctioneer for the right or privilege to sell at auction, it was not a tax on the article sold. On the contrary, it was held that the tax laid on the amount of sales was *a tax on the goods sold*, and the decision just referred to in the case of the *State Freight Tax* was quoted with approval.

If a tax on the privilege of doing business as an auctioneer be a tax on the goods sold, and if the measurement of that tax by the amount of sales be the criterion to establish that fact, then a tax upon the privilege of doing business as a corporation, because of the receipt, and measured by the amount, of net income, must be held to be a tax upon such income. Being so, it is void unless apportioned among the several states.

"The practical nature of the tax itself," "its natural and reasonable effect," the criterion adopted to determine what corporations fall within the law, the measure of the burden in each case, all demonstrate to a certainty that the tax is in its character —and in the purpose of its authors—an income tax, regardless of the language in which the statute is framed.

Spreckels Sugar Refining Co. v. McClain, 192 U. S., 397, is cited as being identical with the cases

now under consideration. The case will not sustain such claim.

First. The tax there considered was not laid "with respect to carrying on or doing business" as a corporation, but was laid, without distinction, upon "every person, firm, corporation or company carrying on or doing the business of refining petroleum or refining sugar," etc. It was not laid upon the Spreckles Company because it was a corporation, for the use of a corporate franchise, or the enjoyment or utilization in its business of the peculiar advantages accorded by the law to corporations, *but because (and irrespective of the fact that it was a corporation) it was engaged in the business of refining sugar. The* same tax was laid, also, upon every *person and firm* engaged in the same business. The words "carrying on or doing business of refining petroleum or refining sugar," *etc., did not define the subject of the tax, but defined the class of tax payers upon whom the excise was laid.*

Second. The tax was not one on the net income of the business of the respective refiners, but was laid with uniformity "on the gross amount of all receipts of such persons, firms, corporations and companies in their respective business" in excess of $250,000. The crucial tests by which the validity of the Act of August 5th must be tried were absent from that case.

The case of *Veazie v. Fenno,* 8 Wall., 533, also strongly relied upon in support of the Corporation

Tax Law, will not, upon examination, afford it support. Aside from the distinguishing features of its facts and the language of the law there construed, which we will not now dwell upon, it will be seen that the decision rests, and was intended by this court to rest, upon the paramount authority of the United States to establish and to regulate the currency of the country; and the tax upon state banks issuing bills was held to be a valid exercise of the power of Congress to establish a uniform currency in the United States.

Nicol v. Ames, 173 U. S., 521, so much relied upon as supporting the corporation tax, involved and decided a wholly different question. The tax there sustained was one upon the privilege of using in trade the obvious advantages of an exchange.

Mr. Justice Peckham, in that case made the distinction plain:

> "A tax upon the privilege of selling property at the Exchange and of thus using the facilities there offered in accomplishing the same, *differs radically from a tax upon every sale made in any place.* The latter tax is really and practically upon property."

Under the Act of August 5th, the tax is admitted to be laid upon every corporation, regardless of conditions, or of the use by it of special privileges or facilities, provided it is organized for profit and is carrying on or doing business. The tax thus laid is not a privilege tax, but is one (if not upon income) upon the franchise itself, and "is really and practically upon property."

2. The Tax is not Uniform throughout the United States.

Regardless of the limitations, or lack of limitations, in the constitution relative to the taxing powers of Congress, there are certain requirements in respect of taxation which are inherent and necessarily implied. It cannot be said that, by the adoption of the constitution in its existing form, its framers did not speak with reference to these inherent and implied characteristics or constituents of taxation, or that they used a term—which could not then, and cannot now, be defined without reference to these characteristics—in any other than its accepted, normal and equitable meaning. Some of these implied constituents of taxation are, a lawful and public purpose, an honest determination of the subject to be taxed, and a substantial equality of burden in the imposition of the tax upon the subject designated.

Our institutions, and the principles upon which they are founded, derive their origin from the doctrine of equality which attaches to a democracy. Indeed, the particular controversy which led to our independence was based upon this inherent and indispensable element. This theory pervades the entire fabric of the Constitution, and, whether written or unwritten, is its chief foundation. The Constitution cannot be read or applied divorced from this idea. As touching taxation, whether expressed or implied, it must be taken that the grant to the United States of the power to impose tax-

es, carried with it the mandate that the taxes so imposed must be uniform, and must fall with substantial equality on all who are affected thereby.

Of course, the fact is necessarily acknowledged that no tax can be laid which will bear with absolute equity and equality upon all persons or things falling within its scope. The equality of taxation is necessarily only approximate and reasonable, yet, in respect of indirect taxes, that is, duties, imposts and excises, the purpose of the constitution is clearly to provide that they shall fall with approximate equality upon every person or thing subjected to the tax. It did not mean a mere uniformity of plan but a uniformity of subject, a uniformity of rate, and a uniformity of effect.

It being recognized that words are to be considered as used in their ordinary acceptation, the term "taxes," as used in the constitution, must necessarily be construed in accordance with the accepted significance of the word. We do not hesitate to assert that there is *expressed* in the term "taxes" the essential concomitant of equality.

As defined by Judge Cooley, "Taxes are the en-
"forced *proportional* contributions from persons
"and property, levied by the state, by virtue of its
"sovereignty, for the support of government and
"for all public needs" (Taxation, 2nd ed., 1).

> "The person upon whom the demand is made or whose property is taken owes to the state a duty to do what shall be *his just proportion* towards the support of government, and the state is supposed to make adequate and full compensation in the protection which it gives

to his life, liberty and property, and in the increase to the value of his possessions, by the use to which the money contributed is applied. * * * Taxes differ from forced contributions, loans and benevolences of arbitrary and tyrannical periods in that they are levied by authority of law, and by *some rule of proportion which is intended to insure uniformity of contribution and a just apportionment of the burdens of government.* In an exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributors regulated by some fixed general rule, and apportioned by the law according to some uniform ratio of equality. The power is not, therefore, arbitrary, but rests upon fixed principles of justice, which have for their object the protection of the tax payer against exceptional and invidious exactions, and it is to have effect through established rules operating impartially" (*Idem*, 2, 3).

At page 34, speaking of taxes on corporate franchises, Judge Cooley says:

"If the business is one open to free competition between corporations and individuals, and in respect to which corporations would enjoy no special privileges or advantages, a tax upon the privilege of conducting the business under a corporate organization would be wholly unreasonable and unjust, because it would give individuals and partnerships an advantage in the competition; and their competition keeping down prices would prevent corporations from indirectly collecting any portion of the tax from the public, and leave them to bear the whole burden of a demand which, under such circumstances, must prove ruinous."

Again, at page 169, speaking of equality and uniformity in taxation, he says:

> "A license tax might not be unjust though laid upon a single occupation, *provided that it was so laid that none who followed that occupation escaped it.* Let it reach all of a class, either persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality, or are scattered all over the state. *But when for any reason it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality and becomes inadmissible.*"

The case of *Edye v. Robertson*, 112 U. S., 580, is often cited as one establishing the doctrine that the uniformity required by the constitution is merely a geographical uniformity, namely, one which must apply to every part of the country. But in that case it was held that a "tax is uniform when it op-"erates, *with the same force and effect*, in every "place where the subject of it is found." There are thus recognized two elements in "uniformity;" (*a*) it must operate "in every place," and (*b*) it must operate "with the same force and effect."

The law there discussed was one imposing an excise tax on the business of bringing passengers from foreign countries into this country by ocean navigation. The tax was a definite one of 50 cents for each passenger so brought in, and applied not only to every company engaged in ocean navigation, but to every port of entry in the United States.

It is true that, in *Knowlton v. Moore*, 178 U. S., 41, this court declared that the uniformity demanded was a geographical uniformity, but the determination of that case required merely a general application of an excise tax law to all parts of the country, in order to fulfill the necessary uniformity, and the phase of the question presented by the inequitable and unequal application of the corporation tax law of August 5, 1909, was not there presented. The provisions of the inheritance tax law which were there involved applied with unquestioned equality, not alone in every part of the United States, but as respects every member of each class of taxpayers created by the law.

The definition of uniformity quoted from *Edye v. Robertson, supra*, seems more nearly to express the true purpose of the makers of the constitution. A tax law must operate not only uniformly in all parts of the United States, but *"with the same force and effect in every place where the subject of it is found."*

Before the adoption of the Federal or of a State constitution, the idea of equality of burden, as opposed to arbitrary or discriminatory exaction, was entertained by the colonists, and the expression of that idea, in the constitutions formulated by the various states, was in recognition of this essential element in the American conception of taxation, and it was not inserted as a new and important safeguard. Justice and equality are not required in American taxation because they are demanded by

the constitutions, but, rather, they are specified in the constitutions because they have always been recognized as its fundamental elements. At the time of the construction of the Federal constitution, it was impossible to think of taxation divorced from those elements. If the expression "uniform throughout the United States" refer to a geographical uniformity only, then it can be safely asserted that it was employed solely to preclude the possibility of discrimination at any time between the states, but without the intention of adopting and establishing a new and inequitable definition or mode of taxation.

The law must be applicable to all portions of the United States, and it need not be made to apply only to subjects which are found uniformly, or in uniform quantities, in the respective states. But the law must impose the same burden upon the same objects wherever found; or, in the language of the Attorney General (brief of March, 1910, p. 156), "Congress or any other legislature may put "the same tax on different kinds of business, even "though it may not put different taxes on the same "kind of business."

In taxing tobacco the rate must be the same upon all tobacco of the kind which is taxed, wherever it is found (*Patton v. Brady*, 184 U. S., 608); if the tax be upon the business of bringing immigrants into the United States by ocean carriage, it must be by an even rate as applied to every port of entry (*Edye v. Robertson*, 112 U. S., 580), and if a tax be laid upon the use of corporate franchises, or

"with respect to the carrying on or doing business" by a corporation, it must be at the same rate upon all corporations using the same class of franchise, or carrying on or doing business under the same kind of corporate privilege.

It is said that the rate under the present law is the same, to-wit, one per cent.; but the basis of application is different for every corporation called upon to pay the tax, viz: its individual net income above $5,000. It will be a mere coincidence—not the just and equitable operation of the law—which will chance to make the imposition uniform in any two cases in the United States.

> "The uniformity required is the uniformity throughout the United States of the duties, imposts and excise levied; that is, the tax levied cannot be one sum upon an article at one place and a different sum upon the same article at another place. * * * It is contended by the government that the situation only requires a uniformity geographical in its character. That position would be satisfied if the same duty were laid in all the states, however variant it might be in different places of the same state. *But it could not be sustained in the latter case without defeating the equality which is an essential element of the uniformity required, so far as the same is practicable.*" (Per FIELD, J., 157 U. S., 592-3).

So, in *United States v. Singer*, 82 U. S., 111, MR. JUSTICE FIELD, speaking of the excise tax imposed upon all distillers and assessed with respect to 80% of the producing capacity of each distiller, said:

> "The tax here is uniform in its operation; *that is, it is assessed equally upon all manu-*

> *facturers of spirits wherever they are.* The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

Our contention is that the constitutional rule of uniformity requires that the tax shall be levied upon the subjects of taxation wherever they may exist in the United States, and, also, that *the same rate of taxation* must be applied to all the subjects of taxation wherever found.

The argument drawn from tariff duties which are imposed, sometimes with reference to the value of imports and sometimes with regard to their quantity, does not militate against the accuracy of our position here in respect of uniformity. An *ad valorem* duty upon an article of import, which is imposed upon that article at every port of entry, is uniform, just as is a specific duty imposed without reference to value. But it is submitted, and we think not controverted, that a different rate of duty cannot be imposed upon an article at the port of New York from that imposed upon the like article at the port of Galveston, or at the port of San Francisco; nor, *a fortiori,* can a different rate be imposed upon any designated article of import for each port of entry in the United States.

In *Knowlton v. Moore,* it is said (page 93):

> "Take, for a general example, specific import duties, by which particular specific rates are imposed on enumerated articles, without reference to their value. It is manifest that all such duties are void, if intrinsic equality and uniformity be the rule, and yet in all the

> great controversies which have arisen over the policy of impost duties generally, and particularly as to the economic wisdom of specific duties, never has it been contended that the power to impose them did not exist because of the uniformity clause of the constitution. So, also, mention may be made of the common form of the excises on distilled spirits with the tax per gallon, without reference to the value thereof."

This language does not antagonize the suggestions which we have made, but, rather, confirms and supports them. The power of Congress to provide for either a specific or an *ad valorem* tax is not questioned, but the uniformity clause compels that such tax shall weigh equally, intrinsically, upon every subject so taxed, wherever it be.

And this is the precise idea entertained by this court, as expressed in *Knowlton v. Moore*. At page 89, it is said:

> "Giving to the term uniformity, as applied to duties, imposts and excises, a geographical significance, likewise causes that provision to look to the forbidding of discrimination as between the states, by the levying of duties, imposts or excises upon a particular subject in one state, and a different duty, impost or excise on the same subject in another; and, therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes."

If the subject of taxation cannot be taxed at one rate in one state and at a different rate in another, much less can it be taxed at one rate in one instance and at a different rate in another instance, in the same state.

Yet, under the basis of taxation adopted by the act of August 5, 1909, the equivalent result last referred to is actually produced, not only by the practical operation of the law, but by the obvious intention of its framers.

Granting that the only thing intended to be provided for by the clause was the prevention of discrimination against one or more states, yet, in its ultimate analysis and application, it means that every congressional excise tax shall apply at the same rate upon its subject in every part of the United States—otherwise it will not be "uniform throughout the United States."

What is assessed under the law of 1909 (according to the contention of the United States) is the "business which is done under special and exceptionally advantageous legal and practical conditions" inhering in a corporation; it is a tax for "the use of a corporate franchise" granted, in most cases, by a state government to a corporation. In other words, the tax is claimed to be one upon *the enjoyment of the corporate privilege*, and (if, for the moment, we waive the proposition that a tax upon the use of a franchise is a tax upon the franchise itself) it is manifest that the privilege the enjoyment of which is taxed, is *the same* as respects all corporations of a similar character, organized under the same law and with the same capitalization, regardless of the amount of profits which may accrue from the use of that privilege. For example: There are in the city of Minneapolis, we will say, two corporations organized at the same time, pursuant

to the same general law authorizing their incorporation, each with a capital stock of one million dollars, and each organized for the same specific purpose of carrying on and conducting a wholesale drygoods business. The privilege granted to each by the state, and the franchise used by each, and the rights enjoyed by each thereunder, are identical. Why then should not the tax paid by each be the same? If the tax be, as the Attorney General urges it is (page 38), a privilege tax, should not each corporation pay equally for the same privilege? If the tax be aptly described as "a tax upon the use of franchises in business," how can the conclusion be avoided that each of these two corporations, when using the same franchise, at the same place, at the same time, under the same conditions, and employing the same capital, must be equally assessed? The true principle is concisely stated by MR. JUSTICE FIELD: The same rule must be applicable to all under the same conditions. There should be no discrimination in favor of one against another in the same class.

Home Ins. Co. v. New York, 134 U. S., 594, 607.

A further step in our illustration: One corporation, during the year 1909, earned a net income of $150,000, and, under the terms of the law, is assessed by the Commissioner of Internal Revenue $1,450; the other corporation earned a net income of $5,000 only, and, under the terms of the law, is exempted from the payment of any tax thereunder. Yet both corporations were carrying on and doing

the same kind of business, under identically the same charters, and under similar conditions. Each business was carried on and conducted "under the exceptional and advantageous rules of law applicable" to corporations. The grant of privilege and of power by the state was equal in each case, and a different tax upon the respective corporations violates radically the requirement of uniformity. If, however, the tax be upon *income*, this objection disappears.

It may further be observed that the measure of assessment must bear some relation to the tax, or to the subject of the tax, such as a fixed license fee for corporations engaging in certain kinds of business; or one in proportion to the amount of the authorized capital stock or to the capital stock actually issued; or upon the gross receipts—that is, volume of business. It is undoubtedly competent for Congress to classify its subjects of taxation, so as to include in one class (by way of illustration) manufacturing companies, and in another railroad companies, and in another mercantile companies. It is also competent for Congress to impose a tax upon the various classes at different rates. But we take it that a tax law enacted by Congress which should impose a different tax upon the different corporations comprising any one class would instantly be rejected as unjust and unconstitutional. Congress could not impose an excise tax on the Union Pacific Railway Company of one per cent on its gross receipts and a tax upon the Southern Pacific Railway Company,

for the same privilege, of two per cent upon its gross receipts, and upon the Northern Pacific Railway Company, of five per cent upon its gross receipts, for the same privilege. A law enacting such a tax would be at once rejected as not complying with the constitutional requirement that the excise "shall be uniform throughout the United States." Such a law would be wholly arbitrary, and would enable Congress to exercise, what this court has sought diligently to prevent, the power to destroy.

Yet an excise tax based upon net income accomplishes precisely the inequality and injustice just referred to, in that it possesses no element of uniformity, but in each individual case its amount is dependent, not on the use of corporate privileges, but on general business conditions, on local circumstances, and, more than all, upon the personal equation in each case, to-wit: the sagacity, energy, industry, honesty, and executive ability of the managers and employees of each corporation.

"A special excise tax with respect to the carrying on or doing business by such corporation," or, as expressed by the Attorney General, "under the special conditions which surround, and with the special advantages which attach to, such business when done under the exceptional legal rules applying to corporations," must be sustained, if at all, as a tax on the privilege, granted by the state, which invests the corporation with those special conditions and advantages. *As such, the grant is the same to every corporation to which the same privilege is*

granted. As far as the grant is concerned, it is of uniform value and advantage to each recipient, and the use or misuse which it may make of it afterwards cannot possibly be considered in fixing a basis for its taxation. The adoption of net income as a measure is not referable in any manner to the subject of taxation, and is, as we have said, wholly arbitrary, for the same corporation under one management will operate at a loss, while under another, and with the same business conditions, it will receive a large net income.

A conclusive demonstration of the lack of uniformity in the tax, viewed as a privilege tax, is found in the fact that a corporation which this year is required to pay under the Act of August 5th, may be exempt from payment next year under the same act, although retaining and enjoying the same privileges, and doing business under the same exceptional legal rules applying to corporations, because, during the year 1910, it may receive a net income not exceeding $5,000.

The Attorney General concedes that, if the tax were a property tax, an assessment of the value would be necessary (page 39). He argues that the net income which measures this tax does not represent the value of the franchise, and, therefore, it is not a property tax.

But why is an assessment of value necessary in a property tax? Is it not solely in order to regulate and equalize the burden of the tax and to render it uniform? And can there be any difference of principle in this respect between property taxes

and privilege taxes? Are not the payers of privilege taxes entitled to proportionate equality and uniformity of burden as much as property tax payers?

It is palpable then that a tax based on net income is, in fact, a different imposition on every tax payer, for it is based not on property values, not on the amount of business, not on the privilege which is extended to many, but, as to each tax payer, it is based on what can be made in the way of net income. Hence, we maintain that this law establishes one rule for one tax payer and a different rule for another, and is not uniform in its operation as a privilege tax.

It is therefore, submitted that, while an excise law must operate with uniformity throughout the United States, such uniformity demands, not alone that it shall apply to the specified subjects of taxation wherever found, but, equally, that it shall lay its burden with just and uniform proportion upon each subject within its embrace.

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3. The Act of August 5th invades the sovereignty of the States.

Through the courtesy of Mr. Maxwell Evarts, we have been enabled, as already stated, to examine the brief, filed by him and by Mr. Wardner in the *Flint Case*, which so fully and convincingly presents this particular question to the court. We can add nothing to the conclusiveness of their presentation and refrain from any argument on this point.

POINT II.

IF THE ACT OF AUGUST 5th BE CONSTITUTIONAL AND VALID, IT IS NOT OPERATIVE AS RESPECTS THE MINNEAPOLIS SYNDICATE.

Three facts which distinguish it from all other corporations now before the court are emphasized in respect of the *Minneapolis Syndicate*:

First: It is not, and since January 1, 1907, has not been, a corporation organized for profit.

Second: It is not, and since January 1, 1907, it has not been, carrying on or doing business of any kind.

Third: Its only income since the first day of January, 1907, has been rental paid to, and received by, it under a lease, for a term of 130 years, of a tract of land owned by it in the city of Minneapolis, which is the only property it possesses.

The record shows that prior to the 27th day of December, 1906, the *Minneapolis Syndicate* was the owner of certain lots constituting the westerly one-half of Block 87 in the town of Minneapolis, and engaged in letting stores and offices in a building, the property of said corporation, upon said premises, and of collecting and receiving rents therefor; that, on said day, it sold, conveyed and delivered possession of said building, and has not since owned, or does not now own, control, occupy or let the same, or any part thereof; that on the same day it demised and let all of said land to cer-

tain lessees for the full term of 130 years from January 1, 1907, at an annual rental of $61,000; that it has no other property whatever, and that, after the making of said lease, and by reason thereof, said corporation ceased to do business, and thereupon caused its articles of incorporation to be amended so that the sole purpose of the corporation is to hold the title to the westerly one-half of Block 87 of the town of Minneapolis subject to said lease, and, for the convenience of its stockholders, to receive and distribute the rentals that accrue therefrom.

It will thus be seen that the entire property of the company is out of its possession and immediate control; that the corporation, by amendment of its articles, has no power to engage in business, for profit or otherwise, and that, if the corporation be taxable at all, it is "solely by reason of its ownership" of the premises described, which the Attorney General concedes, in the brief filed in March, 1910, does not fall within the purview of the Act of August 5, 1909. Upon page 29 of that brief, the Attorney General says:

> "The quotation already made from *Knowlton v. Moore,* 178 U. S., 81, interprets the *Pollock case*—undoubtedly with the concurrence of the entire court—as referring to a tax 'imposed upon property solely by reason of its ownership.' That must mean a tax upon property by reason of its mere existence or ordinary enjoyment, though the property is not put to some special use. A tax upon business is not a tax *'imposed upon property solely by reason of its ownership'*; for, if the property

> is not put into business use, no tax falls upon it or its income."

Its property is not put by the *Minneapolis Syndicate* into use in any business conducted by it, but the income derived from it by the corporation is merely an income arising from the ordinary enjoyment of property as owner.

Again, at page 36, the Attorney General says (the italics are his):

> "*No tax is imposed in any way or on anything unless business is actually done.* The statute lays the tax in terms 'with respect to the carrying on or doing business,' whether by a corporation or joint stock company or insurance partnership. If no business is actually done, there is therefore no tax, notwithstanding the fact that the corporate franchises all the while exist and may have very large value."

And again, page 39:

> "The tax is not exacted at all, in any way or on any thing, unless the franchises are actually used in the transaction of business, *and* a business income above $5,000 results from such use."

It is impossible to assert that (*a*) the *Minneapolis Syndicate* is organized for profit, (*b*) that it possesses any franchise to engage in active business; (*c*) that it is using any franchise in the transaction of business; or (*d*) that it is deriving "a business income" resulting from any such use. It is in the position, in fact, suggested by the Attorney General, of possessing a corporate franchise, but it is doing no business. It is conceivable that,

if its lessees should default in their observance of the lease, the possession and power of use of the leased premises might revert to the corporation, in which event it might be necessary for it *again to become authorized to do, and actually to engage in, business.*

Its income cannot be increased or diminished by any exertion or neglect of its officers, or by any speculation, or by any changes in markets or in supply and demand, or by any means whatever except a modification of the lease by consent of the parties thereto.

It is submitted, therefore, that, if the Act of August 5th be constitutional and valid, no tax thereunder is assessable against the *Minneapolis Syndicate*, because it has not the corporate capacity to engage in business, it is not organized for profit, it is not using its property in business, it is not transacting any business, and it is receiving no income derived from carrying on or doing business.

1. The corporation is not "organized for profit."

It cannot be controverted that two conditions must exist, in order to bring a corporation within the embrace of the Act of August 5th. Those conditions are: (*a*) The corporation must be one "organized for profit"; (*b*) It must be "carrying on or doing business." The only interpretation of which the act is susceptible is, that *a corporation, in order to be liable to the tax, must be carrying*

on or doing business for profit.

It is conceded by the Attorney General that, if a corporation, even if organized for profit, be not doing business, it is not amenable to the law; and it is palpable that, if a corporation which is not organized for profit be doing business, it is not amenable to the law. The definitions which we quote in the succeeding division of this brief, as to what constitutes a business corporation—or the carrying on or doing business by a corporation—illuminate also the other element demanded by the law of August 5th, and demonstrate that the profits referred to are profits *arising from the carrying on and doing business.*

In *Mundy v. Van Hoose,* 104 Ga., 292, the court defined profits as "excess of value received for pro-"ducing, keeping or selling, over cost; hence, pe-"cuniary gain in any transaction or occupation; "emolument."

The term "profit" is distinct from "income," and there can be no justification in construing the phrase "organized for profit" to mean "owning property," or so as to embrace in the category of corporations attempted to be reached by the act, those which, though passive, are receiving incomes derived from invested property, but not from "carrying on or doing business."

In the apt phrase of CHIEF JUSTICE FULLER, property is but a fiction without the beneficial use of it (158 U. S., 625-6), and the receipt of rents of land is, in cases like that of the *Minneapolis Syndicate,* simply the concomitant of ownership.

In *Gray v. Darlington*, 82 U. S., 63, this court said:

> "The advance in value of property during a series of years can in no just sense be considered the gains, profits or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property."

And, referring to the income tax of the war period requiring a payment of five per cent upon "the gains, profits and income for the year ending the 31st of December," it continues:

> "This language has only one meaning, and that is that the assessment, collection and payment prescribed are to be made upon the annual products or income of assessed property or labor, or such gains or profits as may be realized from *a business transaction begun and completed during the preceding year.*"

This illustrates the position of this appellant. The Act of August 5th, viewed from any aspect, clearly contemplates that the income upon which the tax is to be computed (whether that income be, as claimed by the supporters of the act, a mere basis of measurement, or whether, as the appellant here contends, it be the real subject of taxation) is *the income which represents gains or profits realized from business transactions carried on by the corporation during the preceding year.*

If this be not the true construction of the act, then the qualifying words "organized for profit" must be utterly ignored, and the act be construed to apply to every corporation which receives an in-

come, whether from investments only or from "carrying on or doing business."

In his brief of March, 1910, the Attorney General concedes that a tax on the mere ownership of personal property is not permissible under the Act of August 5th (pp. 28-9). It is obvious that the sole purpose of the *Minneapolis Syndicate* since the disposition of its property in December, 1906, has been the passive ownership of the land described in the bill of complaint. Such ownership is a natural right which cannot be classed and assessed as a taxable privilege, and it accordingly results that, if applied to the *Minneapolis Syndicate*, the Act of August 5th would lay upon it a tax "from the mere ordinary or purely proprietary enjoyment of the property," and would, as to this corporation, fall within the admitted embrace of the decision in the *Pollock Case*. Indeed, the situation of this corporation comes directly within the distinction made in that case as understood and limited by the Attorney General (*ubi supra*):

> "Turning to the exact holding of the *Pollock Case*, we shall find the distinction to have been that a tax on income is a direct tax on the property, personal or real, which supplies the income, if the income proceeds from the mere ordinary or purely proprietary enjoyment of the property. The distinction does not reach to the case of taxation of income gained *through the use of property in conjunction with labor and, usually, also with other property, in business of one kind or another.*"

The property of this corporation is not used in business at all, or in conjunction with labor or other capital, whether money, machinery or real property. If the *Minneapolis Syndicate* be taxable under this law, it is taxable because, and solely because, it receives rental from land—which is simply an incident of its ownership, and constitutes "the mere ordinary or purely proprietary enjoyment of the property"—not because it is carrying on or doing business, either in connection with the land or otherwise, and in spite of the fact that it is not organized for profit. Not only will it be taxed solely by reason of the fact that it receives the rent, but the weight of the burden of its taxation will be dependent wholly upon the amount of the rent which it receives.

JUDGE MILLER, in delivering the opinion of the Court of Appeals in *Bennett v. Austin*, 81 N. Y., 308, 319, distinguished between rents and profits, saying:

> "The rent of lands or buildings is such a sum as may be paid and realized from their occupation by tenants, and is fixed and certain; while *profits* are the result of trade, which is fluctuating and uncertain, and dependent upon skill, care, and the nature and amount of the business transacted."

In *People v. Board of Supervisors of Niagara County*, 4 Hill, 20, BRONSON, J., said:

> "It is undoubtedly true that 'profits' and 'income' are sometimes used as synonymous terms; but, strictly speaking, 'income' means that which comes in, or is received, from any

> business or investment of capital, without reference to the outgoing expenditures; while 'profits' generally means the gain which is made upon any business or investment when both receipts and payments are taken into account."

It is a familiar rule of statutory construction that words used in a statute are assumed to be taken in their ordinary and usual acceptation, and it is idle to deny that, in common parlance and to the average mind, the term "profits," as applied to a business corporation, is inevitably associated with the gains derived from business transactions, and is clearly differentiated from mere income derived from an investment.

It is inconceivable that a corporation which has "retired from business" can be deemed a corporation carrying on or doing business for profit, simply because it has money in bank, or invested in bonds, upon which it is receiving interest. The income of the *Minneapolis Syndicate* from rent corresponds merely to interest on money so invested, —not income gained from money risked in business ventures.

The appellant submits that the Minneapolis Syndicate is not, and since January 1, 1907, has not been, a corporation organized for profit, and that it does not, therefore, come within the class of tax paying corporations to which the Act of August 5, 1909, applies.

2. The corporation is not carrying on or doing business.

Whatever interpretation may be put upon the tax sought to be imposed by the Act of August 5, 1909, it is palpable that none is attempted to be laid except "with respect to the carrying on or doing business," and it is important that the meaning of these essential words be ascertained.

In *Roberts v. State*, 26 Fla., 362, the court said, in relation to a statute forbidding anyone to carry on or conduct the business of a liquor dealer without first paying a license:

> "'To engage in' means 'to embark'; to take a part; to employ oneself; to devote attention and effort; to enlist. Webster's Dictionary. 'To manage' is defined by Webster to be 'to have under control and direction; to conduct; to guide; to administer; to treat; to handle'; These definitions * * * substantially mean the same thing as the words 'carry on' and 'conduct' used in the statute."

> "Business in a legislative sense is that which occupies the time, attention, and labor of men for purposes of livelihood or for profit; calling for the purpose of a livelihood. * * * *An indispensable criterion of business is that profit is intended.*"
>
> *State v. Boston Club*, 45 La. Ann., 585.

In the case of *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex., 153, a mortgage given by a corporation was in question, as to whether it was executed in carrying on the corporate business. The court said:

> "Business is defined to be that which busies, or that which *occupies the time, attention or labor* of one as his principal concern, whether for a longer or shorter time; employment; occupation; * * * it is the synonym of employment, signifying *that which occupies the time, attention and labor of men for the purpose of a livelihood or profit.* The corporation making the conveyance in question was a private trading corporation, the business of which consisted in buying and selling for profit in the ordinary course of mercantile business.
>
> That was its business within the meaning of the statute, *and when they* [*the corporation*] *ceased without intent to resume, the business no longer existed*, and no contract thereafter made could be essential to the transaction of —the doing of—that business. The mere act of paying or securing an indebtedness can never become a business."

In *Graham v. Hendricks*, 22 La. Ann., 524, referring to business, the court said:

> *"It implies operations conducted with a view to realizing the profits which come from skillful purchase, barter, speculation and sale."*

In *Harris v. State*, 50 Ala., 127, it was held that to "engage in or carry on business," within the meaning of a revenue law, is *to pursue an occupation or employment as a livelihood, or a source of profit.*

> "It is true the doing of a single act pertaining to a particular business will not be considered engaging in or carrying on business; yet a series of such acts would be so considered."

In *In re Alabama, etc., Railway Company,* 9 Blatchf., 390 (Federal Cases, No. 124), JUDGE WOODRUFF said:

> "In its broadest sense, the word 'business' includes nearly all the affairs in which either an individual or a corporation can *be actors.* * * * Does, then, the doing of any acts whatever pertaining to the affairs of a railroad corporation constitute 'carrying on business' in the sense of the act? Has the term 'carrying on business' the same meaning as 'transacting any of its business'? * * * I am constrained, not only by considerations already suggested, but what upon the words themselves should be deemed the proper interpretation, to answer these questions in the negative. * * * Carrying on business looks to the scheme and purpose to which such transactions tend, and not to the incidental transactions themselves."

In *Holmes v. Holmes,* 40 Conn., 117, considering a statute with reference to married women "carrying on business," the court said:

> "What is meant by the expression is that the married woman must be pursuing a business *as an employment,* to the carrying on of which she devotes a considerable portion of her *time and skill and means,—a business that is continuing in its nature and embraces many transactions."*

As a general rule, the performance of a single act will not be considered as engaging in or carrying on business within the meaning of a law imposing a license or tax thereon; and the same is true of a number of isolated or unconnected acts. (See cases collected in note 6, 21 *Am. & Eng. Enc. of Law* (2nd ed.) 811.)

People v. Horn Silver Mining Co., 105 N. Y., 76, 83.

> "We are not prepared to hold that an occasional business transaction—that keeping an office where meetings of the directors are held, transfer books kept, dividends declared and paid, and other business merely incidental to the regular business of the corporation is done —would bring a Corporation within this act."

In *State v. Barnes*, 126 N. C., 1063, it was said by the Supreme Court of North Carolina that a merchant who, as occasion required, took lumber or shingles in payment of a debt or in exchange for goods kept by him for sale, was not carrying on a lumber business, so as to become subject to a license tax on lumber dealers.

Individual acts performed for the private benefit of a person are not taxable as constituting the doing or carrying on of business.

See cases cited in n. 8, 21 *Am. & Eng. Enc. of Law* (2d ed.) 811.

A corporation, as has been held by numerous decisions of this court, is a person, and is no more taxable on account of the doing of an isolated act in connection with its property, or engaging in some transaction for the preservation or adjustment of property owned by it, than would be an individual in like situation.

> "The following of one of the ordinary employments of life is not to be regarded as a privilege unless expressly made so by statute."
> *Cooley on Taxation* (2d ed.), 571.

In the case of the *Minneapolis Syndicate*, it is apparent, not only that during the year 1909 it was not carrying on or doing business so as to come within the scope of the corporation tax law, but that, by the amendment of its charter, *it had no power to engage in business*, inasmuch as, after such amendment, "the sole purpose of the corpo- "ration" was "to hold the title to the westerly half "of Block 87 of the Town of Minneapolis, subject "to a lease thereof for a period of 130 years from "January 1, 1907, and, for the convenience of its "stockholders, to receive, and to distribute among "them, from time to time, the rentals that accrue "under said lease." The corporation occupied precisely the position of an individual who, having invested his entire fortune in a piece of land, has leased the land for a long term of years, and has retired from business to enjoy at leisure the returns which his property brings in.

In *State v. Anniston Rolling Mills*, 125 Ala., 121, this was expressly declared. In that case it appeared that the Anniston Rolling Mills was a corporation organized under the laws of Alabama prior to the year 1897, to manufacture and deal in iron and iron products. In 1895 it leased its mills to another company. During the year 1897 it collected rent under the lease, took out policies of insurance to protect itself against loss or damage by fire, paid taxes upon its property, held certain meetings of its directors, employed attorneys to represent it in securing a reduction of its taxes,

and, finally, took action to cancel the lease which it had made of the property. The State brought the suit against it to recover the license tax for the year 1897, for "doing business as a corporation." The court held that the defendant was not liable to pay the tax; that the tax imposed by the statute was for "doing business as a corporation," and *not for the mere privilege of existing as a corporation; and that the acts referred to "were mere incidents for the preservation of its property" and did not lay it open to assessment as doing business.*

It is not open to argument, it seems to us, that a corporation whose sole purpose is to hold the title to property can be said to be carrying on or doing business. Such a corporation is not an actor, but is as nearly an absolutely passive institution as it is possible to conceive.

It may be conceded that, prior to the leasing of its property in December, 1906, the *Minneapolis Syndicate* was a business corporation, and was engaged in carrying on or doing business while it owned its building and let offices therein; but, after the sale of its building and the lease of its property, the company retired from business, and there has ever since been lacking the essential element of doing business, namely, active participation in affairs with a view to earning a profit therefrom.

Thus in *Goddard v. Chaffee,* 2 Allen, 395, it was said:

> "'Business' is a word of large signification and denotes the employment or occupation in

> which a person is engaged to procure a living."

In *Hickey v. Thompson,* 52 Ark., 237, it is declared that the primary signification of the word "business" is employment—that which employs time, attention and labor.

All of these elements are lacking in the case of the *Minneapolis Syndicate.*

In *Shryock v. Latimer,* 57 Texas, 677, the word "business" was declared to denote *that which occupies the time, attention and labor of men for the purpose of profit or improvement.*

In *Braeutigan v. Edwards,* 38 N. J. Eq., 545, it was said:

> "In speaking of the business that may be done by a merchant, banker or railroad company, the mind does not contemplate or dwell, upon the character or quality of the means used, but of *the operations,* whether great or small, complex or simple, numerous or few, for one or the other of these conditions may arise from much or little stock or capital. In other words, business does not mean dry goods, nor cash, nor iron rails and coaches. Business is not these lifeless and dead things, but the *activities* in which they are employed. When in motion, then the owners are said to be in business; and then it is that merchants and others speak of the profits of business."

The defendant corporation has no property except its leased land.

It need scarcely be pointed out that it is impossible that both the Minneapolis Syndicate and the lessees of its realty are engaged at one and the

same time in carrying on the business to which said property is devoted.

The lessees of the land, who are the owners of the building standing upon it, are the ones who are "carrying on and doing business" in respect of such property, and the *Minneapolis Syndicate* cannot be taxed "with respect to the carrying on or doing business" which is conducted *by its lessees.*

By a singular coincidence (which we refer to here merely as an illustration in argument), the easterly one-half of Block 87 in the Town of Minneapolis (the westerly one-half of which is owned by the *Minneapolis Syndicate*) is owned by an individual, who has leased the same for a period extending beyond 100 years. He has no possession, use or control of the premises whatever, but merely receives and enjoys the rents accruing and paid under the lease. Can it be said that, as respects the easterly one-half of Block 87, its owner is "carrying on or doing business"?

In like manner, the *Minneapolis Syndicate* is receiving its rents, and has no possession, use or control of its premises, and is not engaged in any activity in which its property is employed, or carrying on any business affairs or venture therewith, looking to any increment or profit. If the owner of the easterly one-half of the block, being an individual, is not "carrying on or doing business" by reason of his ownership and receipt of rents, is the *Minneapolis Syndicate* carrying on or doing business, being a corporation?

The surrender by the Minneapolis Syndicate of the power to purchase, barter, speculate, deal in, or even to lease, real property,—and its consequent deprivation of the capacity to realize profits or income from any activity or employment,—establish, in connection with the facts admitted in the record, that, with the sale of its building and the making of its lease in December, 1906, "said corporation ceased to do business" and "has engaged in no business of any kind whatever" since; that during the year 1909 it was not carrying on or doing business, and, therefore, was not amenable to the operation of the act of August 5, 1909.

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3. The Corporation has no income except rents.

We advert again to the fact that the rule is established,—and conceded—that taxes on real and personal property are direct taxes, and that taxes on the rents of real estate and the income of personalty are equally direct taxes.

The only income received by the *Minneapolis Syndicate* since January 1, 1907, has been the sum of $61,000 paid to it by its lessees under the lease mentioned. *Such income is unmistakably rent or income of real estate,* and, since no tax can be imposed upon the corporation "with respect to carrying on or doing business," if one be exacted from it under the Act of August 5, 1909, it will be necessarily *a tax upon the rents and income of real estate.* The corporation has no other property except the real estate; it has no other source of in-

come; and it will be required to pay, if it must pay, solely because it received $61,000 in rentals.

In the language of Senator Aldrich, "What is the use of playing upon words?" As respects this corporation, the tax resolves itself clearly and simply into a tax upon rents received from real property, and is simply and obviously a direct tax, whether it be called a tax upon the ownership of property, an income tax, or a tax upon rents, each of which is a tax upon the land itself.

4. The law does not apply to holding companies.

There is this to be said further:

From the facts connnected with its preset situation, and from the words defining its powers contained in its amended charter, it is apparent that the *Minneapolis Syndicate* is, as respects the land described in its amended charter, merely a "holding company," and not a business corporation.

> "The sole purpose of the corporation shall be to hold the title to the westerly one-half of Block 87 of the Town of Minneapolis, now vested in the corporation, subject to a lease thereof for a term of one hundred and thirty (130) years from January 1, 1907, and, for the convenience of its stockholders, to receive, and to distribute among them, from time to time, the rentals that accrue under said lease, and the proceeds of any disposition of said land."

The words of the charter above quoted after the figures "1907," add nothing to the powers, and do not change the character, of the corporation; for

if these words were entirely omitted it would be authorized to perform the acts specified in them, under the provisions of §2852 of the Revised Laws of 1905 of the state of Minnesota, as follows:

> "Every corporation formed under the provisions of this chapter shall have power * * * 4. To acquire by purchase or otherwise, and to hold, enjoy, improve, lease, encumber and convey, all real and personal property necessary to the purposes of its organization."

Hence, this charter is to be construed as if it read:

> The sole purpose of the corporation shall be to hold the title to the westerly one-half of Block 87 of the Town of Minneapolis, now vested in the corporation, subject to a lease thereof for a term of one hundred and thirty (130) years from January 1, 1907.

So authorized, the corporation would be enabled to receive and distribute rents under the inherent right accompanying ownership, and under the powers common to every Minnesota corporation.

In statutory construction, the intent of the legislature must be made to govern, both in all proceedings which are had under the law and in all judicial controversies which bring those proceedings under review.

As to the attitude of Congress in respect of this class of corporations, there is no room for debate. Not only are they excluded from the application of the act by its plain words (paragraph first), but, by the express affirmative action of Congress, they were excluded. Reference to page 4228 and the

following pages of volume 44 of the *Congressional Record* discloses that, in the course of the debate upon this provision of the Tariff Act, Senator Clapp of Minnesota offered an amendment which should expressly include holding companies—those which, not engaged actively in mercantile, manufacturing or other profit-making business, yet had income-producing assets. It is undoubtedly true that the amendment of Senator Clapp was intended to reach more especially the holding companies which, by acquirement of the capital stocks of other corporations, are enabled to control their operation, and have an important, if not monopolistic, power in certain channels of the business world; nevertheless its scope was sufficiently general to include the *Minneapolis Syndicate*, and the numerous similar corporations existing in the United States.

At page 4233, we find it recorded that Mr. Aldrich (the senator from Rhode Island), who was the father of, and sponsor for, this act in the senate, said:

> "Mr. President, I am so anxious to get through with the consideration of this bill that I am going to accept the amendment of the Senator from Minnesota (Mr. Clapp)."

It is interesting to note that Senator Bailey harbored a lingering fear of the Greeks even when bearing gifts, for he said:

> "I would like that acceptance to be accompanied with some kind of assurance that it is not going to be sacrificed in conference."

The Record, page 4234, shows that the amendment was agreed to without division.

Later on the conferees of the two houses of Congress were unable to agree upon it, and the amendment was stricken out.

It is impossible, therefore, to have doubt as to the intention of Congress in this legislation. It has affirmatively placed itself on record as not intending to include within the scope of the act holding-companies which are not engaged in active business pursuits for profit.

In connection with the foregoing, it is not only interesting but highly important to note that the objections advanced to the acceptance of the amendment proposed by Senator Clapp were based upon the ground that, if holding companies were assessable, *there would result double taxation.* It was pointed out by Senator Clapp in the course of the debate that, *if the tax be an excise tax for the privilege of existing or doing business as a corporation,* then it is immaterial what the nature of the corporate assets may be; and Senator Cummins, an ardent advocate of this measure, in addressing the senate on the subject, said (page 4232):

> "You are attempting to make the people of the country believe that this tax will meet the decision of the Supreme Court [in the *Pollock case*] by making the miserable distinction the Senator from Rhode Island has just pointed out. I agree with him that we have come to a time now when we can dismiss these words. *It is not an excise tax. It is an income tax.*"

The distinction referred to by Senator Cummins was in the following statement made by Senator Aldrich, found upon pages 4231-2, when opposing the adoption of the Clapp amendment:

> "What is the use of playing upon words? I want to know whether an income tax is not a tax of the same kind, paying out of the same fund, upon the profits? It makes no difference what you call it. It is only a question of words. The Senator from Iowa may say this is an income tax; I may say it is a corporation tax; another may say that it is a tax upon earnings; another may say that it is an excise tax. You may characterize it as you please, it is a precise duplication."

No one can gainsay the accuracy of the attitude of Senator Clapp. If the tax be a mere excise or privilege tax "upon the enjoyment or utilization in business of the peculiar advantages accorded by law to corporate business," then it is wholly immaterial what the nature of the corporate business may be, or what the character of its assets.

If, however, the inclusion of "holding companies" would result in double taxation, then, inasmuch as the double taxation arises *from making two corporations pay upon the same income,* the tax must be in its nature an income tax, and the propriety and consistency of exempting holding companies from the operation of the law cannot be disputed.

Certain it is that the *Minneapolis Syndicate* is not a corporation organized for profit, nor one that is carrying on or doing business. And equally certain is it that the Act of August 5th, if valid,

does not extend to impose upon it the tax which it exacts.

This case falls directly within the rule definitely announced in *Pollock v. Farmers Loan & Trust Co.*, and requires no further discussion.

It is submitted:

1. That the Act of August 5th, 1909, is unconstitutional and must be declared void.

2. That, in any event, the Minneapolis Syndicate is not liable to the tax, because it is not a corporation organized for profit, and was not carrying on or doing business during the year 1909.

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